

Work choices case essay



**ASSIGN
BUSTER**

THE WORK CHOICES CASE: A shift in federal balance? A need to confine the corporations power? I INTRODUCTION The submissions of the Australian Federal Government that the Workplace Relations Act 1996, amended by the Workplace Relations Amendment (Work Choices) Act 2005 was constitutionally valid prevailed with a majority of 5: 2 by the High Court of Australia. 1 This High Court decision inaugurated a shift of legislative power from the States to the Commonwealth. Since officially coming into effect as of 27 March 2006, the Work Choices Act has been the most comprehensive reformation in Australia in nearly a century, constantly sparking matters of controversy. 3 In the vision of Sir Samuel Griffith, principal author of the Australian Constitution, the notion of a federal balance is known as 'coordinate federalism'.

4 This means that the Commonwealth and the States are not subordinate to each other, with the design of allowing both governing authorities to execute their responsibilities without intervention of the other. 5 Michael Johnston, 'A Simplified National System?' (2006) 15 (2) Polemic 2006 1, 1-2

lib. unimelb. edu. au/fullText; dn= 20070322; res= AGISPT> at 12 April 2007. 2 Joe Catanzariti, High Court Holds Work Choices Valid, (2006) 12 (8) Employment Law Bulletin December 2006 81. 3 Iain Ross, John Trew and Tim Sharard, Bargaining Under Work Choices (2006) 1-3.

4 Leslie Zines, The High Court and the Constitution (4th ed, 1997) 1. 5 Tony Blackshield and George Williams, Australian Constitutional Law and Theory: Commentary and Materials (4th ed, 2006) 296. The concept of an ideal federal balance can never be established, as there are no definite answers. 6

Likewise, there is no certainty at the scope of s 51 (xx) of the Constitution. 7 With reference to the High Court's interpretation of the ' federal balance' in the Work Choices Case, the keystone of this essay would be the argument that there has been a shift in it and that there should be a confinement with regards to the margins of s 51 (xx). Thus, the challenges of constitutional interpretation will be discussed first.

II CHALLENGES OF CONSTITUTIONAL INTERPRETATIONThe High Court of Australia was divided in opinion as to whether a broad 8 or narrow 9 view of the Constitution should be adopted in deciding whether the Commonwealth's enactment of the Work Choices legislation under section 51(xx) of the Constitution was constitutional. 6Andrew Buckland and David Bennett, ' The Work Choices Decision Litigation Notes' (2006) 14 Australian Government Solicitor 1, 2 ; <http://search.informit.com.au>.

ezproxy.lib.unimelb.edu.

[au/fullText; dn= 20070182; res= AGISPT](http://au/fullText;dn=20070182;res=AGISPT) ; at 12 April 2007. 7 George Williams, ' The Constitutional and a National Industrial Relations Regime' (2005) 10 (1) Deakin law Review 498-500. See, eg, *Jumbunna Coal Mine, No Liability v Victorian Coal Miners Association* (1908) 6 CLR 309, 367-8; See also *A-G (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 611 (Higgins J). 9 See, eg, *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 82 (" There is nothing in the context of s 51 (xx) which compels the conclusion that the language in the power is expressed should be given a restricted interpretation... [W]e should recognise the power confers a plenary power with respect to the categories of

<https://assignbuster.com/work-choices-case-essay/>

corporation".). It can be said that it is impossible to ascertain the precise scope of the corporations power, 10 which over the years, has led to multiple debates regarding its ambit and how the Constitution should be construed.

11 The primary reason why a narrow interpretation of the Constitution is preferable is due to the fact that the Constitution ' must be read as a whole and coherent document'. 12 As part of the dissenting judges' reasoning, Kirby J placed an emphasis on the application on the principle of coherency 13 in the process of explicating the Constitution. By adopting a narrow view of interpretation, the resulting compromise would be a violation of the coherency principle. 14 It is initiated that an adequate interpretation of the Constitution would take into account its design, structure, provisions and purpose. 15 In essence, the structure of the Constitution can be regarded as being simple and straightforward, 16 often incorporating only a few words in establishing the most fundamental principles which govern society.

17 0 Simon Evan et al, *Work Choices: the High Court Challenge* (1st ed, 2007) 1-9 11 Andrew Stewart and George Williams, *Work Choices: What the High Court Said*, (1st ed, 2007) 72. See, eg, *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482 and *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323. 12 *Catriona Cook et al, Laying Down the Law* (6th ed, 2005) 208, 209. 13 *Ibid.* 14 *Blackshield and Williams*, above n 5, 325-335. 15 *Melissa Castan and Sarah Joseph, Federal Constitutional Law: a Contemporary View* (2nd ed, 2006) 30-36.

16 *Cheryl Saunders, It's Your Constitution*, (2nd ed, 2003) 14-23, 127-133. 7 *Patrick Parkinson, Tradition and Change in Australian Law*, (2nd ed, 2001)

128-132. See also John Cain, James Stephens and Natalie Blok, 'WorkChoices - the implications' Part 1 (2006) Victorian Government Solicitor's Office November 2006 Lunchtime Seminar Series, ; [http://www.vgso.](http://www.vgso.vic.gov.au/resources/publications/cnl/nov%202006_workchoices.pdf)

[vic.gov.au/resources/publications/cnl/nov%202006_workchoices.pdf](http://www.vic.gov.au/resources/publications/cnl/nov%202006_workchoices.pdf); at 14 April 2007. Generally, the Constitution aims to provide basic information in regards to the Executive, the judicature, limitations on powers of governing authorities and so forth.

8 Since all these principles have been described in broad terms, the flaw of the Constitution is that there is no absolute method of interpretation, thus no specification or detailed information is provided. 19 Arguably, the initial intention was not to allocate more authority to the Commonwealth. 20 On one occasion, the majority expressed that the plaintiffs encountered obstacles in advancing their claim that the upholding of the constitutional validity would distort the federal balance. 21 The counter argument to the plaintiffs' submission was that the federal balance was non-existent. 2 Similarly, it was made apparent by the majority that there was no need for a preservation of a federal balance in order to explicate the Constitution.

23 In other words, the majority disapproved the concept of a federal balance. 24 18 David Barker, *Essential Australian Law*, (2nd ed 2005) 63-69. 19 Gary Heilbronn et al, *Introducing the Law*, (6th ed 2006) 58-61. 20 Saunders, above n 16, 132. See also Ron McCallum, 'The Australian Constitution and the Shaping of Our Federal and State Labour Laws' (2005) 10 (1) *Deakin law*

Review 461-463. 1 John Hsu, ' Work Choices Legislation Upheld by high Court' (2006) *Batallion Legal* 1, 1-2 < <http://www.batallion.com.au/Web-workchoices.pdf>> at 9 April 2007.

22 Stewart and Williams, above n 11, 2-5. 23 Jeffrey Leigh Sedgwick, ' The Prospects of Restoring the Federal Balance' (2006) 17 (1) *JSTOR Polity* < [http://links.jstor.org/sici?sici=0032-3497\(198423\)17%3A1%3C66%3ATPO%22TF%3E2](http://links.jstor.org/sici?sici=0032-3497(198423)17%3A1%3C66%3ATPO%22TF%3E2).

0. *CO%3B2-7*> at 10 April 2007. 24 George Winterton et al, *Australian Federal Constitutional Law Commentary and Materials*, (1st ed, 1999) 892-896 See also *Work Choices: the High Court Challenge*

[u/pdf/HighCourtChallenge%20\(21Nov\).pdf](http://u/pdf/HighCourtChallenge%20(21Nov).pdf)> at 5 April 2007. However, this essay attempts to contradict the majority by underpinning that the concept of a federal balance still exists. In applying the principle of coherency, the minority purported that taking apart par (xx) of Section 51 of the Constitution whilst disregarding other parts of its content would be a serious misapprehension. 25 Likewise, the same principle applies to the scrutiny of words found in the Constitution. Fundamentally, it would be a mistake to isolate particular word(s) or a phrase in the process of interpretation without taking cognizance of the rest of the context.

6 One example of the application of this principle can be demonstrated through the attempt of identifying and classification of ' constitutional corporations'. 27 A ' constitutional corporation' could well take either of these three forms - foreign corporation, trading corporation or financial

<https://assignbuster.com/work-choices-case-essay/>

corporation. 28 Adopting a broad or narrow view of constitutional interpretation would definitely bring about different results. This can be seen in the example of the University of Western Australia being classified as a trading corporation. Although this institution 5 Evan et al, above n 10, 24, 38-39, 44-45; Kennett G, 'Constitutional Interpretation in the Corporations Case' (1990) 19 Federal Law Reserve. 26 Winterton et al, above n 24, 16-28, 891-896; Stewart and Williams, above n 11, 43-45.

27 Evan et al, above n 10, 24, 6-12, 97. 28 Keven Booker, Arthur Glass and Robert Watt, Federal Constitutional Law: An Introduction (2nd ed, 1998) 38-39, 41. . was first established for educational purposes, the rationale was that UWA was found to be a participant of investing operations which partially contributes to its annual income.

9 From the minority standpoint, an uncompromising shift of labour regulating power from the States to the Commonwealth would inevitably lead to a severely diminished application of State laws in a variety of areas. 30 For instance, education, healthcare, sports and recreation, transportation, agriculture, environmental management and security are some of the many areas now regulated by the federal government which previously fell under the control of the States. 31 Inevitably, the federal balance has shifted in favour of the defendants. Hence, the Constitution has to be read with all generality, maintaining coherence with all parts of its content in terms of words, language and characterisation to preserve this balance. 29 Johnston, above n 1, 8. 30 Darell Barnett, 'The Corporations Power and Federalism: Key Aspects of the Constitutional Validity of the Workchoices Act' (2006) 29 (1) The University of New South Wales Law Journal 91-99.

31 Stewart and Williams, above n 11, 152-157. See also Michael Coper, Encounters with the Australian Constitution, (1978) 124. III RUDIMENTS OF THE FOUNDING FATHERS Another consideration when deciding upon the Work Choices litigation would be from a historical dimension. 31 This particular section of the essay focuses on the roots of the Constitution, 32 with close examination of the initial intentions of the framers of the Constitution, 33 as well as a series of reasons on why the adoption of a narrow interpretation of the Constitution is important in maintaining the federal balance with respect to the vision of the Founding Fathers.

Essentially, one main purpose was to have a “ fair” distribution of powers between the Commonwealth and the States, 34 thus actualising what was deemed to be the “ ideal federal balance”. In addition, it was intended by the framers that the states would be left with greater responsibilities, preventing the Commonwealth from impinging too far on the reserved state powers. 35 Furthermore, it can be said that the initial objective was to restrict the expansion of the Commonwealth power to ensure that the federal balance was undisturbed. 6 31 Cook et al, above n 12, 10-11. 32 Evan et al, above n 10, 39-40; Patrick Parkinson, Tradition and Change in Australian Law, (3rd ed, 2005) 3. 33 Parkinson, above n 17, 128-132; Stewart and Williams, above n 11, 61-62.

34 Saunders, above n 16, 21, 132; Booker, Glass and Watt, above n 28, 29-30. 35 Winterton et al, above n 24, 819, 820-825, 834, 836, 852-859, 874-876. 36 Ibid. In the Work Choices Case, as part of his dissenting opinions, Kirby J stated: ‘ The words must also be interpreted remembering their constitutional function. They must reflect the fact that the Constitution is a “

living instrument”, intended to respond to the needs of changing times. ’ 37 A ‘ living’ Constitution can be defined as an embodiment of governing principles with contemporary meaning, which would continue to evolve over time without compromising on its original drafting intentions and purposes.

38 With that said, the purposes of a ‘ living’ Constitution established more than a century ago will still remain relevant for its interpretation. 39 Society is a dynamic entity, subject to changes from time to time. 40 The submission of the Commonwealth that a different approach should be adopted in constitutional interpretation in response to an ever-changing society evokes controversies. 41 The contention of whether a drastic shift of powers from the States to the Commonwealth through the passing of the Work Choices Act would require a different means of interpreting the Constitution. 42 37 *New South Wales & Ors v Commonwealth* (2006) 52 HCA 184, 472. 8 Stewart and Williams, above n 11, 60-61; Keith E.

Whittington, *Constitutional Interpretation: textual meaning, original intent and judicial review* (1999). 39 See, eg, Official record of the debates of the Australasian Federal Convention, Adelaide, 13 April 1897, 506 (Alfred Deakin); Official Report of the National Australasian Convention Debates, Sydney, 2 April 1891, 610 (Sir Samuel Griffith). 40 Zines, above n 4, 2-3. 41 *Winterton et al*, above n 24, 875. 42 *Ibid*, 821, 826. In substance, there is a need to conform constitutional interpretation parallel to the ‘ morphing’ of modern society, but solely on the basis that it takes into account the Constitution’s most fundamental principles of a balance of power between the federal government and the States.

43 In contrast to the majority's reasoning for a broad interpretation of the Constitution, it is conceived that the High Court judgement in the Work Choices Case would mark a significant violation of the flexibility and liberality of the 'living' Constitution. 40 One of the drafters' intentions was to allow the Constitution to evolve over time. 45 There is an emphasis that those intentions and visions of the Founding Fathers were not authoritative, but rather it was initiated to shed some light upon its meaning and how it was originally understood. 46 As mentioned earlier, there is no provision of an orthodox methodology for constitutional interpretation, which has been the cause of skepticism and perplexity in establishing a clear understanding of its contents and how governing authorities should administer it to satisfy the requirements of society.

7 43 Booker, above n 28, 93. 44 Blackshield and Williams, above n 5, Chapter 8. 45 Michael Coper and George Williams, *How Many Cheers for Engineers?* (1997). 46 Lee Hoong Phun and George Winterton, *Australian Constitutional Perspectives*, (1992). 47 Zines, above n 4, Chapters 1, 17.

The majority's reasoning seemed dubious as what was established a century ago will still be relevant to modern society because interpreting the Constitution broadly would upset the federal balance. Thus, it is necessary to confine the scope of s 51 (xx). IV IMPACTS A A Simplified National System? There has been broad speculation regarding the various implications as a corollary of the passing of the new legislation. 48 Those in favour of the majority's decision, particularly the Howard Government, were convinced that the amendments made to the existing Workplace Relations Act 1996

play a critical role in laying the foundation towards establishing a 'simplified national system of workplace relations'.

49 The Commonwealth claimed that the establishment of a 'national workplace relations system based on the corporations power' would help 'simplify the complexity inherent in the existence of six workplace jurisdictions in Australia'. 50 This was believed to be for the betterment of society as a whole through the granting of greater flexibility to employers in terms of hiring (and firing). 51 48 Johnston, above n 1, 1-2. 49 Ibid. 50 Bob Whyburn, 'Work Choices: In the Beginning', (2007) 74 (May/June 2006)

PRECEDENT, 5-7

informit.com.au.ezproxy.lib.

melb.edu.au/fullText; dn= 20063457; res= AGISPT> at 12 April 2007.

51 Ross, Trew and Sharard, above n 3, 1. Besides, this 'simplified national system' was also surmised to boost the country's economy as well as increase living standards of Australians. 52 Furthermore, there would be an extensive coverage of employment relationships across the nation, which is conjectured to cover approximately 85 per cent of the Australian workforce.

53 Of course, up to date, the answer to the extent of this coverage remains ambiguous as there have been assertions of different figures. 4 The primary focus, however, is not the political or socio-economic benefits which this system is predicted to bring. Basically, this paragraph disposes of the Commonwealth's claims, on the basis that approval of the majority's reasoning would imply a significant alteration to the federal balance. This is because through the expansion of the Commonwealth's power, it is plausible

<https://assignbuster.com/work-choices-case-essay/>

that the federal government would extend its influence upon 'constitutional corporations',⁵⁵ even to the extent of encroaching on both internal and external affairs of a corporation. Dissenting judge Callinan J expressed his concern over this issue, elucidating that the radical decrease of state power might bring down the role of the States to 'impotent debating societies'.⁵⁷ Michael Walton, 'The New South Wales Industrial Relations System: 1998 to the Workplace Relations Amendment (Work Choices) Act 2005' (2006) 29 (1) The University of New South Wales Law Journal 47-78.

⁵³ Explanatory Memorandum, Work Choices Act s 9. ⁵⁴ Evan et al, above n 10, 55-59. ⁵⁵ Ibid. ⁵⁶ Stewart and Williams, above n 11, 76-77. ⁵⁷ New South Wales & Ors v Commonwealth (2006) 52 HCA 327, 779.

The ruling that the Work Choices Act was constitutionally valid, according to Kirby J, was a means of 'destabilising the federal character' of the Constitution. More explicitly, it was implied that the 'inhibition on the scope of federal legislative powers' was necessary to preserve its federal structure. Instead of fulfilling its initial function of 'effective governmental entities' as intended by framers of the Constitution, the States would now have little or no choice but to submit to becoming 'service agencies' to the Commonwealth. Essentially, this paragraph has highlighted several implications as a result of an uncontrolled interpretation of the corporations power.

In agreement with the minority, this essay recognises a shift in the federal balance and purports that a limitation in the ambit of s 51(xx) is vital. New South Wales & Ors v Commonwealth (2006) 52 HCA 211, 542; Stewart

and Williams, above n 11, 52. 59 New South Wales & Ors v Commonwealth (2006) 52 HCA 213, 550; Stewart and Williams, above n 11, 54 60 New South Wales & Ors v Commonwealth (2006) 52 HCA 213, 549; Stewart and Williams, above n 11, 53. V CONCLUSION In conclusion, the challenges of constitutional interpretation and rudiments of the founding fathers both support this essays's principal argument of a shift in power to the Commonwealth.

The firm conviction is that the new legislation has severely eroded the federal balance Although the Commonwealth and the States under the Australian Constitution have two separate methodologies and philosophies regarding the way things should be run, they both have the general population in mind in decision making. However, the reach of s 51(xx) should be limited so that there is a greater balance of power between the two entities. The corporations power should therefore be confined in various ways to prevent in skew in power in either direction. BIBLIOGRAPHY 1.

Articles/Books/Reports Barker, David, Essential Australian Law, (2nd ed 2005) Barnett, Darell, ' The Corporations Power and Federalism: Key Aspects of the Constitutional Validity of the Workchoices Act' (2006) 29 (1) The University of New South Wales Law Journal Blackshield, Tony and Williams, George, Australian Constitutional Law and Theory: Commentary and Materials (4th ed, 2006) Booker, Keven, Glass, Arthur and Watt, Robert, Federal Constitutional Law: An Introduction (2nd ed, 1998) Buckland, Andrew and Bennett, David, ' The Work Choices Decision Litigation Notes' (2006) 14 Australian Government Solicitor 1, 2

unimelb. edu. au/fullText; dn= 20070182; res= AGISPT > at 12 April 2007

Cain, John, Stephens, James and Blok, Natalie, ' WorkChoices - the implications' (2006) Victorian Government Solicitor's Office November 2006

Lunchtime Seminar Series,

gov. u/resources/publications/cnl/nov%202006_workchoices. pdf> at 14 April

2007 Castan, Melissa and Joseph, Sarah , Federal Constitutional Law: a

Contemporary View (2nd ed, 2006) Catanzariti, Joe, High Court Holds Work

Choices Valid, (2006) 12 (8) Employment Law Bulletin December 2006 81

Cook, Catriona et al, Laying Down the Law (6th ed, 2005) Coper, Michael and

Williams, George, How Many Cheers for Engineers? (1997) Coper, Michael,

Encounters with the Australian Constitution (1978) Evan, Simon et al, Work

Choices: the High Court Challenge (1st ed, 2007)H P Lee and Winterton,

George, Australian Constitutional Perspectives (1992) Heilbronn, Gary et al,

Introducing the Law, (6th ed 2006) Hsu, John, ' Work Choices Legislation

Upheld by high Court' (2006) Batallion Legal 1, 1-2 < <http://www. batallion. com>.

com.

au/Web-workchoices. pdf> at 9 April 2007 Johnston, Michael, ' A Simplified

National System? ' (2006) 15 (2) Polemic 2006

au. ezproxy. lib. unimelb. edu. au/fullText; dn= 20070322; res= AGISPT> at

12 April 2007 Kennett, G, ' Constitutional Interpretation in the Corporations

Case' (1990) 19 Federal Law ReserveMcCallum, Ron, ' The Australian

Constitution and the Shaping of Our Federal and State Labour Laws' (2005)

10 (1) Deakin law Review Parkinson, Patrick , Tradition and Change in

Australian Law, (2nd ed, 2001) Parkinson, Patrick, Tradition and Change in

<https://assignbuster.com/work-choices-case-essay/>

Australian Law, (3rd ed, 2005) Ross, Iain, Trew, John and Sharard, Tim, Bargaining Under Work Choices (2006) Saunders, Cheryl, It's Your Constitution, (2nd ed, 2003) Sedgwick, Jeffrey Leigh, 'The Prospects of Restoring the Federal Balance' (2006) 17 (1) JSTOR Polity < [http://links.jstor.org/sici?ici=0032-3497\(198423\)17%3A1%3C66%3ATPO%22TF%3E2.0.CO%3B2-7](http://links.jstor.org/sici?ici=0032-3497(198423)17%3A1%3C66%3ATPO%22TF%3E2.0.CO%3B2-7)> at 10 April 2007 Stewart, Andrew and Williams, George, Work Choices: What the High Court Said, (1st ed, 2007) Walton, Michael, 'The New South Wales Industrial Relations System: 1998 to the Workplace Relations Amendment (Work Choices) Act 2005' (2006) 29 (1) The University of New South Wales Law Journal Whittington, Keith E, Constitutional Interpretation: textual meaning, original intent and judicial review (1999) Whyburn, Bob, 'Work Choices: In the Beginning', (2007) 74 (May/June 2006) PRECEDENT au.ezproxy.lib.unimelb.edu.au/fullText;dn=20063457;res=AGISPT> at 12 April 2007 Williams, George, 'The Constitutional and a National Industrial Relations Regime' (2005) 10 (1) Deakin Law Review Winterton, George et al, Australian Federal Constitutional Law Commentary and Materials, (1st ed, 1999) Work Choices: the High Court Challenge [federationpress.com.au/pdf/HighCourtChallenge%20\(21Nov\).pdf](http://federationpress.com.au/pdf/HighCourtChallenge%20(21Nov).pdf)> at 5 April 2007 Zines, Leslie, The High Court and the Constitution (4th ed, 1997) 2.

Case Law